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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. ~~60~~-38

UNITED STATES OF AMERICA, PETITIONER,

VS.

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1954

CERTIORARI GRANTED APRIL 26, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 654

UNITED STATES OF AMERICA, PETITIONER,

vs.

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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1 In United States Court of Appeals for the Second Circuit

PETER BROWN, PLAINTIFF-APPELLANT

against

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

STATEMENT UNDER RULE 15(b)

On April 9, 1952, the summons and complaint were served. Answer was served on the 26th day of September, 1952.

This appeal is taken from an order and judgment made by E. J. Dimock, U. S. D. J., dismissing the complaint herein.

The plaintiff's notice of appeal was filed on the 6th day of July, 1953.

No property was attached; no questions were referred to a commissioner, master or referee.

2 Summons. (Omitted in printing.)

[Title omitted]

3 In United States District Court

COMPLAINT

Plaintiff, by Harry E. Kreindler, his attorney, for his complaint against the defendant, respectfully shows to this Court and alleges:

FIRST: Plaintiff at all times hereinafter mentioned was and now is a citizen of the United States, resident and domiciled in the State of New York, City and County of New York.

SECOND: That this Court has jurisdiction by reason of Section 1346 of Title 28 of the United States Code and chapter 171 of Title 28 of the United States Code, known as the Federal Tort Claims Act.

THIRD: The claim for relief is in an amount in excess of \$3,000.

FOURTH: That defendant, the United States of America, through its employees and through the Veterans' Administration, a Federal agency, at all times hereinafter mentioned, did, and now does, operate a hospital at 130 West Kingsbridge Road, the Bronx, New York.

FIFTH: That the plaintiff was duly admitted into said hospital on October 1, 1951, for the purpose of having an operation performed upon his left knee.

SIXTH: That on October 4, 1951, plaintiff's left knee was operated upon by the defendant, the United States of America, through its employees.

SEVENTH: That the defendant, the United States of America, through its employees, in a grossly negligent and careless manner, permitted a defective tourniquet to be applied to the plaintiff's left leg during said operation.

EIGHTH: That the defendant, the United States of America, through its employees, in a grossly negligent and careless manner applied said tourniquet to the plaintiff's left leg; that the defendant, the United States of America, through its employees, in a grossly careless and negligent manner, did not promptly remove said tourniquet from the plaintiff's leg, but negligently and carelessly continued to increase the pressure therein.

NINTH: That at all times during said operation, plaintiff was under the complete control of the defendant; that he was under the influence of a spinal anesthetic, and that he was not able to see or feel the application of said tourniquet.

TENTH: That as a result of the said negligent and careless acts and without any contributory negligence on the part of the plaintiff, the plaintiff was severely injured. He was confined to said hospital for approximately sixteen (16) weeks, and was thereafter, and is now, required to report to said hospital each day for treatment. Plaintiff has lost all sensitivity in portions of his left leg below the knee and has lost control of certain of the muscles in that portion of his leg, and is unable to walk without the aid of orthopedic braces. Plaintiff has suffered and will continue to suffer great physical and mental pain and anguish and has lost much time from his employment with consequent loss of earnings and his earning capacity has been permanently impaired.

ELEVENTH: That by reason of the premises, plaintiff has been damaged in the sum of \$100,000.

5 TWELFTH: Plaintiff has at all times born true allegiance to the Government of the United States of America and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$100,000, besides the costs and disbursements of this action.

HARRY E. KREINDLER,
Attorney for Plaintiff,
Office & P. O. Address,
51 Chambers Street,
Borough of Manhattan,
City of New York (7).

6

In United States District Court

The defendant, United States of America, by its attorney, Myles J. Lane, United States Attorney for the Southern District of New York, for its answer to the complaint herein alleges as follows:

1. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Ninth," and "Twelfth."

2. Denies the allegations contained in paragraphs "Seventh," "Eighth," "Tenth" and "Eleventh."

WHEREFORE, the defendant, United States of America, demands judgment against the plaintiff, dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, N. Y.

MYLES J. LANE,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant.*

By: JOHN M. FOLEY,
*Assistant United States Attorney,
Office and Post Office Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.*

7 IN THE UNITED STATES DISTRICT COURT

INTERROGATORIES—March 5, 1953

The defendant requests that the plaintiff, Peter Brown, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. State whether or not plaintiff is a veteran.
2. If the answer to Interrogatory No. 1 is in the affirmative, state the date and the nature of plaintiff's discharge.
3. If the answer to Interrogatory No. 1 is in the affirmative, identify the branch and organization in which plaintiff saw service and state the period or periods of plaintiff's service.
4. If the answer to Interrogatory No. 1 is in the affirmative, state whether plaintiff was ever injured or wounded while a member of the Armed Forces.
5. State whether or not plaintiff was admitted to the Veterans Administration Hospital at No. 130 Kingsbridge Road, Bronx, New York, as a result of his veteran's status.
6. State whether or not plaintiff at the time of his admission in said hospital suffered from any service-connected disability or disabilities. If the answer to this interrogatory is in the affirmative, specify the nature of such disability or disabilities.
- 8 7. State whether plaintiff received at any time a pension from the defendant or one of its agencies. If the answer to this interrogatory is in the affirmative, state how and under what circumstances such pension was awarded, the amount of said pension and the awarding agency.

New York, N. Y.

MYLES J. LANE,

*United States Attorney for the
Southern District of New
York, Attorney for United
States of America,*

by JOHN M. FOLEY,

*Assistant United States Attorney,
Office and P. O. Address:*

*United States Courthouse,
Foley Square, Borough of Manhattan,
City of New York, N. Y.*

IN UNITED STATES DISTRICT COURT

ANSWER TO INTERROGATORIES

Answering interrogatories dated March 5, 1953:

1. Yes. Plaintiff is a veteran.
2. Plaintiff was discharged on August 6, 1944. C. D. D. Section 2.
3. The plaintiff saw service in the Army Air Force from October 27, 1942 to August 6, 1944. He does not have the record of all organizations in which he served within the Air Force, but he does remember serving in the 60th Air Depot Group and the 487th Bombardier Training Squadron among others. He was discharged from the Air Force unassigned.
4. Yes.
5. Yes.
6. Yes.
7. Recurrent dislocation of the patella.
8. Yes. Pension was awarded by the Veterans Administration upon application of the plaintiff at the time of discharge. The original pension was for 30% disability.

It has varied since then from 10% to 100%.

(Sworn to by Peter Brown, March 13, 1953.)

10

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—March 24, 1953

SIRS:

PLEASE TAKE NOTICE that the defendant, United States of America, will move before a motion part of this Court to be held on April 2, 1953, in Room 506, United States Court House, Foley Square, New York, at 10:00 A. M., or as soon thereafter as counsel can be heard for a summary judgment dismissing the complaint herein or in the alternative, for an order dismissing the complaint for failing to state a claim within the jurisdiction of this Court or in the alternative, for an order dismissing the complaint for failure to state a claim upon which relief can be granted together with such other and further relief as to the Court may seem just and proper.

New York, N. Y.

Yours, etc.

MYLES J. LANE,

*United States Attorney for the
Southern District of New
York, Attorney for United
States of America.*

Office & Post Office Address:

United States Court House,

Foley Square,

New York 7, N. Y.

To:

HARRY E. KREINDLER, Esq.,
*Attorney for the Plaintiff,
51 Chambers Street,
New York, N. Y.*

11

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN M. FOLEY, READ IN SUPPORT OF MOTION

State of New York:

County of New York, ss:

Southern District of New York,

JOHN M. FOLEY, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York. I am in charge of the above matter and am fully familiar with all the facts and circumstances therein.

This affidavit is submitted in support of an application for an order granting a summary judgment in favor of the defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure or in the

alternative for an order dismissing the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure.

This is an action instituted under the provisions of the Federal Tort Claims Act by a veteran to recover damages for personal injuries allegedly sustained by him while a patient at the Veterans Administration Hospital at 130 West Kingsbridge Road, Bronx, New York. The plaintiff, in answer to interrogatories propounded to him by the defendant has stated that he was admitted to this hospital as a result of his veteran status and at the time of admission he was suffering from a service-connected disability.

In *O'Neill v. United States*, decided February 19, 1953,

the Court of Appeals for the Ninth Circuit granted the Government's motion for summary judgment. This case is identical factually with the instant suit.

12 A copy of the *O'Neill* opinion is annexed to this affidavit.

No purpose will be served by paraphrasing the holding or legal reasoning contained therein. It is sufficient to note that the Court held that the Government is not liable under the Federal Tort Claims Act for injuries sustained by a discharged serviceman, and that his proper avenue for relief is in the compensation statutes, Section 31, Public Law 141, 73rd Congress, 38 U. S. C. 501(a).

WHEREFORE, it is respectfully prayed that a summary judgment be entered dismissing the complaint as only an issue of law is to be resolved, or, in the alternative, an order be entered dismissing the complaint under provisions of Rule 12 of the Federal Rules of Civil Procedure.

(Sworn to by John M. Foley, March 24, 1953.)

13 IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEE S. KREINDLER, READ IN OPPOSITION TO MOTION

State of New York,

County of New York, ss:

LEE S. KREINDLER, being duly sworn, deposes and says:

That he is associated with Harry E. Kreindler, Esq., attorney for the plaintiff. That he has possession of the file and is familiar with the contents thereof.

That this affidavit is submitted in opposition to the defendant's motion for summary judgment dismissing the complaint herein, or in the alternative for an order dismissing the complaint for failing to state a claim within the jurisdiction of this Court, or in the alternative for an order dismissing the complaint for failure to state a claim upon which relief can be granted.

That this is an action brought to recover for serious personal injuries sustained by the plaintiff when he was a patient at the Vet-

erans Administration Hospital, at No. 130 Kingsbridge Road, Bronx, New York, on October 4, 1951.

That the plaintiff served in the Army Air Force from October 27, 1942, to August 6, 1944. He was honorably discharged on August 6, 1944, with a service-connected disability (C. D. D. Section 2). The plaintiff had been injured in the left knee during military operations in New Guinea. Following his injury he was hospitalized until August, 1944. He was able to walk, but upon any sudden or strenuous movements, his left leg would become dislocated. On March 8, 1950, he was operated upon by the Veterans Administration, for the purpose of "cleaning up" the knee joint. His leg continued
14 to dislocate frequently, however.

Pursuant to his status as a veteran, the plaintiff was admitted to the Veterans Administration Hospital, at 130 Kingsbridge Road, Bronx, New York, on October 1, 1951, for examination and possible treatment. It was decided at that time that another operation should be performed on his left knee for the purpose of preventing the leg from dislocating. The operation was performed on October 4, 1951. It was to be a so-called bloodless operation, requiring the application of a tourniquet on the left thigh. The tourniquet was applied by an operating room attendant in the employ of the Veterans Administration. The tourniquet was defective in that the pressure gauge was not registering and an excessive amount of pressure was applied to plaintiff's leg. The attendant should have realized that the tourniquet was defective as soon as it was applied, but he did not. As a result of the excessive pressure having been applied by the tourniquet, the nerves in the plaintiff's leg were seriously and permanently injured. The plaintiff was confined to the hospital for approximately sixteen weeks thereafter, and for a long period after that was required to report to the hospital each day for treatment. He lost all sensitivity in portions of his left leg below the knee, and has lost control of some of the muscles in that portion of the leg. He is unable to walk without an orthopedic brace and at this time it appears that he will never regain the full use of his leg.

The negligence alleged on the part of the defendant consists of the application of the defective tourniquet by employees of the defendant, and their failure to recognize the defective and dangerous condition of the tourniquet.

15 The plaintiff brought this action under the Federal Tort Claims Act, 28 USCA 1346, 2671, *et seq.* A summons and complaint was served upon the defendant on April 14, 1952, and after numerous extensions of time to answer, the defendant's answer was received by the plaintiff on September 26, 1952. The answer consisted of general denial.

The defendant has now moved to dismiss the complaint on the ground that the government is not liable under the Federal Tort Claims Act for injuries sustained by a discharged serviceman while

in a Veterans Administration hospital, and that the plaintiff's exclusive remedy is in the compensation statutes, 38 USCA 501A.

There is no question that the plaintiff received a pension from the government upon his discharge, nor does the plaintiff deny that this pension has been increased as a result of the injury he sustained in the Veterans Administration Hospital in 1951. We vigorously contest, however, the defendant's allegation that an award under the compensation statutes constitutes a bar to the bringing of an action under the Tort Claims Act.

The injury sustained at the hands of the government's employees in October, 1951 was a new and different injury from the recurrent dislocation of the patella that the plaintiff had when he entered the Veterans Administration Hospital.

The Federal Tort Claims Act, under which the plaintiff is proceeding, was passed by Congress in 1946, long after the compensation statutes became effective. The Act permits actions to be started against the government for the negligence of governmental employees. Its language is general in scope. It provides (28 U. S. C. A. 2680) for twelve specific exceptions. The plaintiff's action herein does not fall within any one of these exceptions or a combination of any of them, nor is there anything in the Compensation Act (38 U. S. C. A. 501A) providing that that Act is the exclusive remedy for a veteran.

Thus, the government is arguing that new and different exceptions be read into the Tort Claims Act. The government overlooks the fact that the Tort Claims Act was passed in 1946, when Congress was unquestionably cognizant of the rights and remedies of veterans. *Brooks v. United States* (1949), 337 U. S. 49, 69 S. Ct. 918. The government also overlooks the fact that eighteen Tort Claims bills were introduced in Congress between 1925 and 1935. All but two of them contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was introduced the exception concerning servicemen had been dropped. It was this Act, passed without any exclusion, that was passed in 1946, and is the present law. *Brooks v. United States, supra*.

Rather than argue the law in his affidavit, the Assistant United States Attorney has cited the recent case of *O'Neill v. United States*, decided 2/19/53 by the Court of Appeals for the District of Columbia Circuit. I have read this case carefully and examined the authorities cited therein. I have found this decision to be squarely in conflict with the decision of the Court of Appeals for the First Circuit in *Santana v. United States* (1949), 175 Fed. 2d 320, and the decision in *Bandy v. United States* (D. C. Nevada 1950), 92 Fed. Sup. 260. In my opinion, the *O'Neill* case is in conflict with the Supreme Court decisions in *Brooks v. United States* (1949), 337 U. S. 49, 69 S. Ct. 918, and *Feres v. United States* (1950), 340 U. S. 135, 71 S. Ct. 153.

Santana v. United States (1st Circuit 1949), 175 Fed. 2d 320, is a case squarely in point. This also was an action under the Federal Tort Claims Act. The plaintiffs were the heirs of Manuel Rey, a veteran who obtained admission to a Veterans Administration Hospital subsequent to his discharge. The complaint alleged that he died as the result of the negligence of the employees of the hospital in caring for him.

The United States made the same arguments in that case as it does in the case at bar. It argued that there was a comprehensive system of special statutory benefit for service-connected injuries; that Congress in enacting the Tort Claims Act must have intended to exclude such claims from it; that despite the general language of the act and the fact that the act itself contains twelve specific exceptions, none of which excludes an ex-serviceman from its benefits, it should be read as impliedly excluding such claims.

The District Court dismissed the complaint, but the Court of Appeals reversed. The Court of Appeals said, at page 322:

"In our opinion, the decision in the *Brooks* case has completely undermined the arguments of the government in the case at bar * * *

"In the case at bar Manuel Rey was not in the service at the time of the negligence complained of. He had returned to private life as a discharged veteran and inclusion of his claim within the coverage of the Tort Claims Act would involve no problem of the 'subversion of military discipline.'

"With respect to the remaining argument that Congress presumably did not intend to include discharged veterans within the coverage of the Tort Claims Act insofar as they already are covered by a 'comprehensive system of special statutory benefits,' the Supreme Court in its decision in the *Brooks* case, in the language above quoted expressly discredited that argument even as applied to servicemen."

18 The Court in the *O'Neill* case, *supra*, at page 4 of its opinion, passed off the *Santana* case by simply saying that it "was decided before the *Feres* case."

The *Feres* case, however, in no way overrules or distinguishes the *Santana* case, and, in fact is inapplicable to the case at bar. The *Feres* case (*Feres v. United States* [1950], 340 U. S. 135, 71 S. Ct. 153), actually involved three cases.

In the *Feres* case itself, the first of the three cases, the decedent perished by fire in a barracks while he was on active duty in the service of the United States.

In *Jefferson v. United States*, the second of the three cases, the plaintiff, while on active duty in the army was required to undergo an operation. Eight months later, after his discharge, a towel marked

"U. S. Army" was discovered and removed from his stomach. The complaint therein alleged that the towel was negligently left there by the original army surgeon.

In *Griggs v. United States*, the third of the three cases considered, the complaint alleged that the deceased met his death while on active duty because of the negligent medical treatment rendered to him by army surgeons.

It is thus apparent that all three cases concerned negligence of army personnel which cause injury to servicemen while on active duty. The Court said, at page 138:

"The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces * * *

"This is the 'wholly different case' reserved from our decision in *Brooks v. United States*, 337 U. S. 49, 52, 69 S. Ct. 918, 920, 93 L. Ed. 1200."

In its opinion, the Court repeatedly refers to and limits its decision to servicemen on active duty, or "in service." Referring again to the *Brooks* case, the Court said, at page 146:

"The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the government did not further contest the judgment, but contended there could be no liability to the sons, solely because they were in the army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

It is thus clear that the *Feres* decision did not and does not apply to a discharged veteran who is not under orders or on active duty. In no wise did it limit or overrule the *Santana* decision. On the contrary, it specifically limited the implied exception to the Tort Claims Act to cases in which the plaintiff was on active duty.

In the *Brooks* decision (*Brooks v. United States* [1949], 337 U. S. 49, 69 S. Ct. 918), the Court said, at page 50:

"The question is whether members of the United States Armed Forces can recover under that Act (Tort Claims Act) for injuries not incident to their service."

Page 51:

"The statutes and terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that any

claim' means 'any claim but that of servicemen.' The
 20 statute does contain twelve exceptions. None exclude
 petitioner's claims."

Page 52:

"We are dealing with an accident which had nothing to do with the Brooks' army careers; injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented."

Page 53:

"Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual Workmens Compensation Statute, eg., 33 U. S. C. 905, there is nothing in the Tort Claims Act or the Veterans Laws which provides for exclusiveness of remedy * * * In the very act we are construing, Congress provided for the exclusiveness of the remedy in three instances, numbers 403(d), 410(b) and 423 (now 28 U. S. C. A. 1346, 2672, 2679) and omitted any provision which would govern this case."

The *O'Neill* case, *supra*, also relies on *Johansen v. United States*, 343 U. S. 427 (1952), and *Lewis v. United States*, 89 U. S. App. D. C. 21, 190 F. 2d 22 (1951). Neither of these cases, however, has anything to do with either the Tort Claims Act or the Veterans Compensation Act. Both of them were questions of workmen's compensation as provided for under the Federal Employees Compensation Act of 1916 (5 U. S. C. A. 751, *et seq.*). The *Johansen* case
 21 held that having collected workmen's compensation, a civilian employee on a public vessel could not sue the United States under the Public Vessels Act of 1925 (46 U. S. C. A. 781, *et seq.*), which allowed libels in admiralty.

In the *Lewis* case a member of the United States Park Police Force was shot by another member of the same police force engaged with him in the course of duty pursuing two fugitives. It was held that the Federal Employees Compensation Act was the exclusive remedy.

Bandy v. United States (D. C. Nevada 1950), 92 Fed. Supp. 360, is a case in point, however. The plaintiff therein was a veteran who had been discharged with a rheumatic fever disability, incurred while in service. He subsequently entered a Veterans Administration Hospital to receive examination and treatment, if necessary, of the rheumatic disability. In the course of receiving heat treatments, he was placed in an electric cabinet bath. Despite his complaint, he

was kept there too long. He became unconscious and suffered serious burns. On his action brought under the Tort Claims Act, the Court rejected the government's arguments that the plaintiff had made an election of remedies by obtaining compensation under the Veterans Compensation Act, and that his disability (the resulting scars) was a service-connected disability, for which he could not recover under the Tort Claims Act. The Court awarded \$15,000.00 to the plaintiff.

In summary, there is a conflict of decisions in the Circuit Courts and the District Courts. The better law, and the law that conforms to the Supreme Court decisions in *Brooks* and *Feres* supports our contention that the plaintiff herein may pursue his remedy under the Tort Claims Act.

WHEREFORE, I respectfully pray that the defendant's motion be in all respects denied.

(Sworn to by Lee S. Kreindler, April 9, 1953.)

22 IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

OPINION BY JUDGE DIMOCK—June 3, 1953

Memorandum

This motion raises the question whether a discharged veteran who has suffered further injury as a result of treatment of service incurred injury in a Veteran's Administration Hospital and is receiving additional disability benefits for the resulting injury may recover under the Federal Tort Claims Act, 28 U. S. C. 2671, *et seq.* There is a square conflict of authority on this point. Holding that such a recovery may not be had are the recent cases of *O'Neill v. United States*, D. C. Cir., 202 F. 2d 366, and *Pettis v. United States*, D. C. N. D. Cal., 108 F. Supp. 500, while the opposite result was reached in *Santana v. United States*, 1 Cir., 175 F. 2d 320, and *Bandy v. United States*, D. C. D. Nev., 92 F. Supp. 360. I accept the reasoning of the *O'Neill* case.

The motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted.

Dated: June 3, 1953.

E. J. DIMOCK,
United States District Judge.

23 In United States District Court, Southern District of New
York

ORDER AND JUDGMENT APPEALED FROM—June 23, 1953

This cause having come on for hearing on the defendant's motion to dismiss the action in that the Court lacked jurisdiction of the subject matter of the claim asserted therein under Rule 12(b) of the Federal Rules of Civil Procedure, and the Court having heard the argument of counsel thereto, it is, on motion of J. Edward Lum-
bard, United States Attorney for the Southern District of New
York, attorney for the defendant.

ORDERED that the defendant's motion be granted and the com-
plaint be and the same hereby is dismissed, and it is

FURTHER ORDERED that the defendant, United States of America,
recover costs as taxed in the sum of \$20.00 from the plaintiff Peter
Brown and that execution issue therefor.

Dated: New York, N. Y., June 23rd, 1953.

E. J. DIMOCK,
U. S. D. J.

Judgment entered June 23rd, 1953.

WILLIAM V. CONNELL,
Clerk.

24

In United States District Court

NOTICE OF APPEAL—June 30, 1953

Sir:

Notice is hereby given that the plaintiff Peter Brown hereby appeals to the Court of Appeals for the Second Circuit from the order of the Honorable Edward J. Dimock, United States District Judge, dismissing the complaint herein, and from the judgment dismissing this action, together with costs as taxed in the sum of \$20,000, entered in this action on June 24, 1953.

New York, N. Y.

Yours, etc.,

HARRY E. KREINDLER,
Attorney for Plaintiff-Appellant,
51 Chambers Street,
New York 7, New York.

To:

J. EDWARD LUMBARD, ESQ.,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,
(Office & P. O. Address)
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

- 25 STIPULATION AS TO CONTENTS OF RECORD (Omitted in printing)
- 26 STIPULATION OF ATTORNEYS APPROVING RECORD (Omitted in printing)
- 27-28 Clerk's Certificate to foregoing transcript omitted in printing.

29 In United States Court of Appeals for the Second Circuit

No. 87

Argued December 18, 1953

Docket No. 22826

[Title omitted]

Before: CLARK, FRANK and HINCKS, *Circuit Judges*

Appeal from a final order of the United States District Court for the Southern District of New York, Judge Dimock. REVERSED.

HARRY E. KREINDLER (Lee S. Kreindler, of counsel), *for appellant*.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York (Milton R. Wessel, of counsel), *for appellee*.

30 Plaintiff brought this suit against the United States, asserting a claim under the Federal Tort Claims Act, 28 U. S. C. secs. 1346(b), 2674 and 2680. The United States moved for summary judgment. On the basis of the complaint, the answers of the plaintiff to interrogatories and the affidavits filed by both parties the facts presented were as follows:

Plaintiff served in the Army Air Force from October 27, 1942 to August 6, 1944. During that time, while on active duty in New Guinea, he was injured in the left knee. He was hospitalized until his honorable discharge in August, 1944. At that time he could walk, but upon any sudden or strenuous movements, his left leg would become dislocated. On March 8, 1950, "he was operated upon by the Veterans Administration, for the purpose of 'cleaning up' the knee joint."

As, however, "his leg continued to dislocate frequently," he asked to be and was admitted, on October 1, 1951, to a Veterans Administration Hospital in New York. It was then decided that it would be well to perform another operation on the knee to prevent the leg from dislocating; it was to be a "bloodless operation, requiring the application of a tourniquet to the left thigh." In fact, on October 4, 1951, a tourniquet was thus applied by an operating room attendant in the employ of the Veterans Administration. As the tourniquet was defective, in that the pressure gauge did not register, an excessive amount of pressure was applied. "The attendant should have realized" the defect as soon as the tourniquet was applied, but he did not. As a result of the excessive pressure, the nerves in the plaintiff's leg were seriously and permanently injured. Plaintiff was awarded a pension by the Veterans Administration

at the time of his honorable discharge. This pension was increased because of the injury he sustained as a result of the operation in 1951.

31 On these facts, the United States contended that plaintiff's sole relief was under the Compensation Act, 38 U. S. C. sec. 501a. The District Court, agreeing with this argument, made an order dismissing the complaint. Plaintiff has appealed.

OPINION—January 5, 1954

FRANK, *Circuit Judge*:

Admittedly, plaintiff's claim is not within any explicit exception contained in the Tort Claims Act. In *Brooks v. United States*, 337 U. S. 49, the Court refused to read in an exception covering injuries to a serviceman, where the event causing the injury was not "incident to the service." In *Feres v. United States*, 340 U. S. 135, the Court considered three cases relative to injuries incurred while on active duty in the armed forces. In one of these cases, the injury resulted from negligence during the course of an abdominal operation; in another, death resulted from negligent medical treatment by army surgeons. The Court said: "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." The Court held that, on these facts, the federal statutes expressly providing compensation for injuries of those in the armed service are exclusive "where the injuries arise out of or are in the course of activity incident to service," and that, accordingly, for such injuries there can be no recovery under the Tort Claims Act.

In the instant case, the plaintiff, while in active service, had been injured in the left knee during military operations in New Guinea. He received his discharge from the army in August 1944. Seven years later, in 1951, pursuant to his status as a veteran, an operation was performed, in a veterans' hospital, by employees of the government's Veterans Administration, on his left knee, for
32 the purpose of preventing the leg from dislocating. Due to negligence in the course of that operation, he received a further serious injury on which he grounded his suit. Plaintiff is receiving veteran's compensation for this injury, under 38 U. S. C. 501a.¹

¹ It is to be noted that 38 U. S. C. 501a covers compensation not only for an aggravation of an existing injury, but also for a new injury, suffered as the result of hospitalization or surgical treatment furnished under the compensation statute.

We think that these facts do not bring this case within the doctrine of *Feres v. United States*, since no injury of which plaintiff now complains was sustained while he "was on active duty and not on furlough." Moreover, we do not agree with the government's contention that plaintiff's claim is to be deemed merely an aggravation of his original injury and that it is therefore to be regarded just as if it had happened while he was on active duty.

The lower federal courts, in deciding similar cases, have disagreed with one another. *O'Neill v. United States*, 202 F. (2d) 366 (App. D. C.) favors the government's argument. However, it relies on *Feres v. United States* which, we think, not in point, and on *Johansen v. United States*, 343 U. S. 427, which we also regard as inapposite since it involved an interpretation of quite different statutes.² Also favoring the government is *Pettis v. United States*, 108 F. Supp. 500.³

On the other hand, *Santana v. United States*, 175 F. (2d) 320 (C. A. 1), and *Bandy v. United States*, 92 F. Supp. 360, sustain plaintiff's contention. With them we agree. It is urged that those decisions were rendered before *Feres*. We think that argument untenable, in the light of our interpretation of *Feres*.

Of course, we have not considered defenses the government may assert on the merits such as, *e.g.*, New York decisions limiting the liability of a hospital operated as an eleemosynary institution.

35-36 In United States Court of Appeals for the Second Circuit

PETER BROWN, PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE

JUDGMENT—January 5, 1954

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged,

² There the Court, referring to the *Feres* case, spoke of it (343 U. S. at 440) as relating to "soldiers on active duty."

³ *Lewis v. United States*, 190 F. (2d) 22 (App. D. C.), related to an injury to a member of the U. S. Park Police incurred while on active duty.

and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. DANIEL FUSARO, *Clerk*.

37 Clerk's Certificate to foregoing transcript omitted in printing.

38 Supreme Court of the United States, October Term, 1953

No. 654

UNITED STATES OF AMERICA, PETITIONER,

vs.

PETER BROWN

ORDER ALLOWING CERTIORARI—Filed April 26, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.